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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNION UNDERWEAR COMPANY, INC.,
Petitioner,

v.

ELIZABETH WILSON,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the provision of the Flammable Fabrics Act ("FFA"), 15 U.S.C. § 1203(a), preempting any state or local "flammability standard or other regulation" not identical to the federal standard that protects against the same risk of fire-related injuries, encompasses not only positive state law but also common law causes of action.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE STATEMENT

The following were defendants and appellees in the proceeding below: Bradlees of New England, Inc.; Union Underwear Company, Inc.; Sharkey's Sportswear, Inc.; and Paradise Screen Printing Company. The following were third-party defendants and appellees below: Desmond Process Supply; Tubelite Company, Inc.; Union Ink Company; and Flexible Products Company. The plaintiff and appellant in the proceeding below was Elizabeth Wilson, individually and as Mother and next friend of Ailsa DeBold.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Union Underwear Company, Inc. states that Fruit of the Loom, Inc. is its parent company. Union Underwear Company, Inc. has no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Union Underwear Company, Inc. hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 96 F.3d 552, and is included in the Appendix at 1a-15a. The opinion of the United States District Court for the District of New Hampshire granting reconsideration and summary judgment is not reported and is included in the Appendix at 16a-24a. The initial decision of the United States District Court for the District of New Hampshire denying summary judgment is not reported and is included in the Appendix at 25a-60a.

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit was entered on September 25, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Flammable Fabrics Act provides, in pertinent part:

> [W]henever a flammability standard or other regulation for a fabric, related material, or product is in effect under this Act, no State or political subdivision of a State may establish or continue in effect a flammability standard or other regulation for such fabric, related material, or product if the standard or other regulation is designed to protect against the same risk of occurrence of fire with respect to which the standard or other regulation under this Act is in effect unless the State or political subdivision standard or other regulation is identical to the Federal standard or other regulation.

15 U.S.C. § 1203(a).

STATEMENT

A. Factual Background

Union Underwear Company, Inc., ("Union Underwear" or "petitioner"), doing business as Fruit of the Loom, manufactures a variety of clothing items. Its T-shirts and sweatshirts are made of a blend of 50% cotton and 50% polyester, one of the most common fabrics blends used in the United States. These T-shirts and sweatshirts are marketed under brand names including "Fruit of the Loom" and "Screen Stars." Paradise Screen Printing Company ("Paradise") applied decorative logos to sweatshirts made by petitioner. Sharkey's Sportswear Company, Inc. ("Sharkey's) silk-screened petitioner's sweatshirts. Sharkey's then sold these decorated sweatshirts to Bradlees of New England, Inc. ("Bradlees"), a retail clothing outlet.

In August 1990, Bradlees sold a 50/50 cotton blend "Screen Stars" sweatshirt and T-shirt manufactured by petitioner to Elizabeth Wilson, respondent. Both at the time of manufacture and at the time of sale, the T-shirt and sweatshirt complied with the applicable federal flammability standard. App. 2a, 28a. The federal standard, known as CS 191-53, establishes three classes of textile flammability, based on the time it takes a flame to spread and the intensity of the flame, and stipulates the procedure for testing the flammability of textiles. 16 C.F.R. Part 1610, Subpart A. The federal standard prohibits the marketing and handling of dangerously flammable apparel, *id.*, Subpart B, § 1610.32, and requires warning labels for certain other types of apparel fabric, *id.* § 1610.35(a).

According to the allegations in respondent's complaint, in February 1991, Ailsa DeBold, respondent's daughter, was wearing the sweatshirt and T-shirt respondent purchased at Bradlees. DeBold was injured when the garments ignited as she reached across a stove to turn off a kettle. Respondent seeks $5 million in damages for

DeBold's injuries under theories of strict liability, negligence, failure to warn, and breach of implied warranty. In particular, respondent alleges that when the T-shirt and sweatshirt were manufactured and sold they were unsuitable for ordinary use, in a defective condition, and unreasonably dangerous because they "ignited too quickly, burned too rapidly and with too intense a heat." Complaint ¶¶ 4, 9, 19, 24, 44. Furthermore, respondent claims that the T-shirt and sweatshirt were not composed of flame retardant material and carried no warning stating that they were not flame retardant or flame resistant. *Id.* Respondent concedes, however, that the apparel, including the remnants of the garments, comply with the federal flammability standard CS 191-53. App. 28a.

B. The Flammable Fabrics Act

The Flammable Fabrics Act (the "FFA") was enacted in 1953 to prevent unreasonable risks of fire due to the flammability of certain types of wearing apparel as well as other interior furnishings. The FFA adopted CS 191-53 as the federal flammability standard. 15 U.S.C. § 1193 (1958). CS 191-53 was an industry-developed apparel standard that previously had been adopted by the Commerce Department as part of a voluntary compliance program. While the Consumer Product Safety Commission ("CPSC"), a regulatory agency formed pursuant to the Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972), has been authorized to issue new flammability standards and other regulations, 86 Stat. 1230-31, CS 191-53 remains the federal standard.

From its inception, Congress sought to provide a single, uniform and national standard through the FFA. S. Rep. No. 83-400 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1722, 1724. The Senate Report accompanying the Act pointed out that "if [the FFA] is not enacted, a variety of State and local regulations lacking in uniformity might very well ensue." *Id.* Nevertheless, Congress did not include an express preemption clause in the original Act.

In 1967, Congress, once again recognizing that "[t]he mass production, high volume, and national marketing character of the textile industry requires that flammability standards be uniform throughout the country," 113 Cong. Rec. 20328 (daily ed. July 27, 1967), added an express provision to the FFA that the Act was "intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions." Pub. L. No. 90-189, § 16, 81 Stat. 568, 574 (1967). Thus, federal preemption of state law became explicit.

In 1976, however, Congress once again was forced to amend the FFA. The term "inconsistent" in the 1967 preemption clause had been given differing interpretations by the courts, some of whom had concluded that the federal flammability standard only provided a minimum, rather than a uniform, standard. S. Rep. No. 94-251 (1976), *reprinted in* 1976 U.S.C.C.A.N. 993, 1003; see, *e.g.*, *Raymond* v. *Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir. 1973) (New Hampshire's more demanding standard for tort liability not "inconsistent" with federal standard). Congress made clear that the purpose of the FFA and its preemption provision was not only to protect consumers from dangerously flammable products, but also to protect manufacturers from the increased costs and burdens that would result from states adopting various flammability standards over and above the federal standards. See 1976 U.S.C.C.A.N. at 1003-05.

As a result, Congress enacted the current version of § 1203(a) which provides that no state or local government may establish or continue in effect a "flammability standard or other regulation" for a fabric or material unless that standard or other regulation is "*identical*" to the federal standard or other regulation. 15 U.S.C. § 1203(a) (emphasis added). For those states desiring to apply stricter standards, Congress provided that states

could petition the CPSC for an exemption from the FFA. *Id.* § 1203(c).[1]

C. Proceedings Below

Union Underwear, Bradlees, Sharkey's, Paradise and third-party defendant Union Ink moved for summary judgment on petitioner's complaint, arguing that the FFA preempted nonidentical state standards and regulations. On August 9, 1995, the district court denied the motions for summary judgment, holding that because § 1203(a) did not expressly refer to state "law," the preemption provision did not apply to state common law claims, only legislative or administrative regulations. App. 35a. The district court reasoned that "[a] civil action for damages based on a flammability standard which differs from the applicable federal standard does not impose any compliance requirements whatsoever." App. 37a.

On November 8, 1995, the district court reconsidered its ruling and granted summary judgment to petitioner and the other defendants. The district court acknowledged that it had taken an "overly narrow reading" of § 1203(a) and held that the term "standard or other regulation," like the term "requirement" in similar preemption provisions, created " 'no distinction between positive enactments and common law.' " App. 21a (quoting *Cipollone* v. *Liggett Group*, 505 U.S. 504, 521 (1992)). As a result, the district court held that any common law standard protecting against the risk of fire that was not identical to the federal standard under the FFA was preempted. App. 21a. Because respondent's common law claims

[1] New Hampshire has never applied for an exemption from the FFA. Shortly after Congress amended the FFA in 1976 to permit exemption applications, California requested permission to apply stricter state standards for children's sleepwear. *See* 42 Fed. Reg. 39402, 39403 (1977). The CPSC denied the application, finding that the stricter California standard would unduly burden interstate commerce. *Id.* at 39408.

were based on allegations that the T-shirt and sweatshirt did not meet flammability standards that *exceeded* the federal standard under the FFA, the district court held those claims to be preempted. App. 22a-23a.

Respondent appealed the district court's grant of summary judgment to the United States Court of Appeals for the First Circuit. The First Circuit reversed the district court, concluding that *no* common law claims were preempted by the FFA. The court acknowledged that the FFA was intended to establish uniform federal flammability standards, not merely minimum standards. App. 7a. The court also acknowledged the importance of uniform federal regulation, "especially . . . where goods are shipped among states and their standards may vary." App. 8a. The First Circuit, however, concluded that there was "no inescapably 'right' answer" to whether state common law standards were preempted by the FFA. *Id.*

The First Circuit allowed that this Court has construed the term "requirement" in the preemption provision of the Medical Devices Amendments of 1976 to include common law standards. *Medtronic, Inc.* v. *Lohr,* 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in the judgment), 2262-63 (O'Connor, J., Rehnquist, C.J., Scalia, J., Thomas, J., concurring in part and dissenting in part). The court below, however, refused to follow *Lohr* because the FFA preemption provision contains the additional phrase "or other regulation." App. 5a. The First Circuit also refused to follow "the many precedents" construing other preemption provisions in similar statutes. App. 11a. The court distinguished those statutes because they contained statutory terms such as "requirement" rather than "standard" or "regulation" as in the FFA. *Id.*

The First Circuit refused to give the FFA its intended preemptive effect because the FFA was not "the usual full fledged regulatory statute giving an agency admin-

istrative oversight." App. 5a. The court criticized the federal flammability standard *Congress* enacted because it was an "*industry*-developed standard," *id.*, "not one adopted by the federal agency after a searching inquiry into what best serves the public interest," App. 9a. The court conceded that "[f]ederal regulation may be a substitute for common-law liability," but "industry self-regulation is not." *Id.* As a result, the First Circuit concluded that the FFA did not preempt state common law claims, even though the court noted that it might interpret the same statutory text differently if the CPSC developed its own flammability standard. App. 14a-15a.

REASONS FOR GRANTING THE PETITION

The decision of the First Circuit raises a fundamental question with respect to the supremacy of federal law. With respect to the FFA, Congress has made clear its intent that as a general matter state flammability standards that are not identical to the federal standards are preempted. Congress carefully considered and expressly provided for the only exception to this general rule by allowing states to adopt higher flammability standards *provided* that they were approved by the CPSC in advance and that they did not place an undue burden on interstate commerce. 15 U.S.C. § 1203(c). However, under the ruling below, as few as six or twelve individuals on a state court jury can promulgate and enforce higher standards of flammability in an equally effective manner by awarding damages in a common law cause of action. This decision clearly conflicts with this Court's precedents on preemption and ignores Congress's intent to maintain uniform standards for apparel flammability through federal law. In addition, the decision squarely conflicts with the Eighth Circuit's interpretation of the plain meaning of the same statutory terms used in the preemption provision of another consumer protection act. *Moe* v. *MTD Prods., Inc.*, 73 F.3d 179 (8th Cir. 1995). The Eighth Circuit properly held that the terms

"standard" and "regulation" do not distinguish between positive and common law.

Moreover, interstate commerce will be unduly burdened if the First Circuit's decision is allowed to stand. Juries are not required to give—and indeed, are generally forbidden from giving—any consideration to the effect that their decisions will have on interstate commerce or the ability of manufacturers to craft products in such a way that they will meet the standards of 50 different states. The increased cost to consumers and the burden imposed on manufacturers from multiple state standards that do not correspond to the federal standard are enormous. Not only will manufacturers marketing interstate products be burdened with compliance with numerous state standards instead of a uniform standard maintained by the CPSC, but manufacturers will have no way of knowing prospectively what standard a jury will impose for apparel flammability. Even after a jury has imposed a standard, there will be no guarantee that the standard—often a matter of reasonableness rather than, for instance, a set time for flame spread—will enable apparel manufacturers to conform their future clothing productions to that standard.

Under the decision below, Congress ironically has prevented state and local legislatures and agencies from applying their considerable expertise to develop flammability standards that do not conform to the federal standard *except* under the supervision of the federal agency in charge of consumer protection, yet it has given jurors with little or no technical experience and awareness of national policy the absolute authority to promulgate conflicting flammability standards in every state. This result is simply absurd. If allowed to stand, the First Circuit decision will have a profound and detrimental impact on a wide variety of interstate commerce. It will certainly change the way clothing is made and distributed, and do so to the detriment of consumers generally.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REJECTING THE DISTINCTION BETWEEN STATE COMMON LAW AND POSITIVE LAW IN SIMILAR PREEMPTION PROVISIONS OF FEDERAL STATUTES.

Under Article VI of the Constitution, federal law "shall be the Supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Congress expressly preempted state law in the FFA. Thus, the task of the courts below was to determine the scope of Congress's preemptive intent. As this Court reiterated in *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996), "[t]he purpose of Congress is the ultimate touchstone" of preemption analysis. *Id.* at 2250 (quoting *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963)).

"If [as here] the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). In the decision below, the First Circuit, however, went beyond the plain meaning of the FFA to determine for itself "how Congress would have decided the issue [of common law preemption] if Congress had squarely confronted it." App. 9a.

Despite the First Circuit's disappointment with this Court's decision in *Lohr*, App. 15a, the principles reiterated in that case manifestly confirm that broad preemption terms such as "standard" or "requirement" cannot be read to distinguish between positive law and common law rules. In *Lohr*, this Court's most recent ruling on preemption, the Court once again rejected the wholesale distinction between positive law and common law. There, this Court analyzed the preemption provision of the Med-

ical Device Amendments of 1976 which specifies that state "requirements" different from or in addition to any requirement under the MDA are preempted. 21 U.S.C. § 360k(a). While various members of the Court disagreed as to whether the particular common law claims at issue in *Lohr* were preempted, the Court unanimously agreed that the scope of preemption was not limited to positive law. 116 S. Ct. at 2259 (plurality opinion), 2259 (Breyer, J., concurring in part and concurring in the judgment), 2262 (O'Connor, J., Rehnquist, C.J., Scalia, J., Thomas, J., concurring in part and dissenting in part). The common law claims the majority permitted to survive Congress's preemption under the MDA "escape[d] pre-emption, not because the source of the duty is a judge-made common-law rule, but rather because their generality leaves them outside the category of requirements [the statute] envisioned to be 'with respect to' specific devices . . . ." *Id.* at 2258. Thus, those common law claims were not preempted by the MDA only because they fell outside other statutory conditions concerning specificity. In this case, it is not claimed that respondent's common law claims fall outside of the FFA's other statutory conditions.

This Court's decision in *Lohr* follows a long line of cases in which the Court repeatedly has held that as a general matter state common law actions fall within express preemption clauses. In *Cipollone* v. *Liggett Group,* 505 U.S. 504, 515-16 (1992), this Court found that section 5(b) of the Federal Cigarette Labeling and Advertising Act ("FCLA") preempted state common law failure-to-warn claims. Section 5(b) of FCLA provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." 15 U.S.C. § 1334(b). The petitioner in *Cipollone* argued that this preemption language only covered

state statutes, injunctions or executive pronouncements rather than common law actions. The Court flatly rejected this argument, stating that such an analysis was contrary both to "the plain words" of the statute and to "the general understanding of common-law damages actions." 505 U.S. at 521 (plurality opinion), 548-49 (Scalia, J., Thomas, J., concurring in the judgment and dissenting in part). This Court reasoned that the term " 'no requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common-law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Id.* at 521. Moreover, the Court acknowledged that " 'regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' " *Id.* (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)).

In construing statutory language, courts must give effect to the plain meaning of a statute "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983); see also *Cipollone*, 505 U.S. at 521-22 (plurality opinion). The scope of such broad language as the FFA's "standard or other regulation" could not be more plain under this Court's precedents. See also *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (preemption provision of the Federal Railroad Safety Act which requires preemption of any state "law, rule, regulation, order, or standard" warrants no distinctions between positive law and common law since "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases)."

Nothing in the plain language of the FFA suggests that it is limited to positive law. In the case below, the First Circuit clearly ignored this Court's precedents by attempt-

ing to give the terms of the FFA a narrower scope of meaning than other similar terms construed by this Court. While the First Circuit acknowledged that "standards" could refer to the common law, the court below attempted to parse out the statutory language of the FFA in order to arrive at its contrary result. "[R]egulation," the First Circuit held, is "peculiar to positive law." App. 4a. This Court, however, has held otherwise. See *Cipollone*, 505 U.S. at 521 ("*regulation* . . . effectively exerted through an award of damages") (emphasis added) (internal quotations and citation omitted); see also *CSX Transp.*, 507 U.S. at 663-64 (preemption clause with phrase "regulation . . . or standard" encompasses common law duties). Certainly, a jury verdict can set a new, higher standard for flammability as readily as an executive rule.

Furthermore, consulting the legislative history of the FFA provides no support for the First Circuit's manufactured distinction between the common law and positive law. Nothing in the legislative history suggests that Congress intended to permit the common law of the various states to impose nonidentical flammability standards on manufacturers. To the contrary, Congress set up an elaborate statutory scheme by which states could seek to enforce nonidentical, higher protections against the risk of fire, but *only* if such applications were preapproved and the standards were determined not to "unduly burden interstate commerce." 15 U.S.C. § 1203(c). In evaluating such an application, the CPSC specifically was to consider such factors as the "increased cost of . . . production" and the "complexity of . . . required changes in the manufacturer's production or distribution system" before allowing such standards to be imposed. S. Rep. No. 94-251 (1976), *reprinted in* 1976 U.S.C.C.A.N. 993, 1005.

Moreover, congressional silence with respect to the particular issue of the preemption of common law causes of

action does *not* signifiy that those actions are outside the scope of the preemption provision. As this Court made clear in *Cipollone*, even though legislative history may evince Congress's primary concern with positive law, the plain language of the Act must be given effect. 505 U.S. at 521 (plurality opinion), 548-49 (Scalia, J., Thomas, J., concurring in the judgment and dissenting in part). The First Circuit's speculation as to which types of state law it would have preempted had it been Congress is not only directly contrary to Congress's manifest intent to preserve uniformity in flammability requirements, but is based wholly on the court's unabashed belief that the flammability standard Congress chose to enact was inappropriate. The First Circuit's disagreement with the standard imposed by Congress does not validate its usurpation of the legislative function. Moreover, it is of no relevance how Congress developed its substantive flammability standard.[2] Congress's preemptive intent remains the same. Because the decision below will have a significant, adverse effect on interstate commerce, subjecting manufacturers such as Fruit of the Loom to myriad and unpredictable flammability standards from state to state, the decision below should be reviewed by this Court.

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[2] Many standards enacted into law by Congress or promulgated by various agencies exercising delegated authority are developed by industry, which often has the time and resources that Congress or the agencies lack. Under the Telecommunications Act of 1996, for instance, the "television industry" is permitted to develop the television rating code. 47 U.S.C. § 303 & note. Other regulations, like the FAA's CS 191-53, are more specific. For example, the Federal Railroad Administration requires that "[t]he heads and shell [of locomotives] shall be made of Aluminum Association Alloy No. 5083-0, produced in accordance with American Society of Mechanical Engineers (ASME) Specification SB-209." 49 C.F.R. § 229.51 (1996). The Department of Transportation's Hazardous Materials Regulations reference so many industry-developed standards that they are incorporated by list. *See* 49 C.F.R. § 171.7 (1996).

II. THE DECISION OF THE FIRST CIRCUIT IS IN DIRECT CONFLICT WITH THE EIGHTH CIRCUIT'S DECISION IN *MOE* v. *MTD PRODUCTS, INC.* WHICH CONSTRUES IDENTICAL LANGUAGE IN THE PREEMPTION CLAUSE OF THE CONSUMER PRODUCT SAFETY ACT.

The Consumer Product Safety Act ("CPSA"), using the same statutory terms at issue in the FFA, prohibits any state or local government from establishing or continuing in effect "any provision of a safety *standard or regulation* which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are *identical* to the requirements of the Federal standard." 15 U.S.C. § 2075(a) (emphasis added). In *Moe* v. *MTD Products, Inc.*, 73 F.3d 179 (8th Cir. 1995), the Eighth Circuit held that common law claims related to the same risk of injury addressed by the federal standard were expressly preempted by this language. "Allowing a jury to assess damages for MTD's failure to place a warning label on the mower handle would create a state standard or regulation requiring such a warning." *Id.* at 182. Thus, in the Eighth Circuit, preemption provisions involving "standards" and "reglations" do not by their terms distinguish between positive law and common law claims.

Moreover, the CPSA—unlike the FFA at issue in this case—contains a so-called "savings clause" which provides that compliance with federal standards does not relieve common law liability. 15 U.S.C. § 2074(a). Following customary principles of statutory construction, the Eighth Circuit held that the general terms of the savings clause " '[could not] be allowed to supersede the specific substantive pre-emption provision.' " *Moe*, 73 F.3d at 183 (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992)). In reaching the deci-

sion below, however, the First Circuit found support for its perceived distinction between positive law and common law in the CPSA. The First Circuit stated that Congress had "expressly rejected" the preemption of common law claims in the CPSA, contrary to the holding of *Moe*. App. 8a n.3. Thus, preemption provisions with the same operative terms are given the opposite preclusive effect in the First and Eighth Circuits. But for the fact that the injuries in this case occurred in New Hampshire rather than Nebraska, petitioner's common law causes of action would have been preempted. This Court should grant certiorari to resolve this conflict in the courts of appeals regarding the plain meaning of the terms "standard" and "regulation" in preemption clauses contained in fundamentally important legislation regulating the safety of products and fabrics that flow in interstate commerce.

III. THE DECISION OF THE FIRST CIRCUIT IS INCONSISTENT WITH THE DECISIONS OF NUMEROUS OTHER COURTS OF APPEALS REJECTING DISTINCTIONS BETWEEN COMMON LAW AND POSITIVE LAW IN THEIR INTERPRETATIONS OF SIMILAR PREEMPTION PROVISIONS IN OTHER FEDERAL CONSUMER PROTECTION STATUTES.

Since this Court's decision in *Cipollone*, many courts of appeals have held that similar preemption provisions in other federal consumer safety statutes apply to positive law *and* common law claims. The Federal Boat Safety Act ("FBSA"), for instance, provides that a state or local government "may not establish, continue in effect, or enforce a law or *regulation* establishing recreational vessel or associated equipment performance or other safety *standard* or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306 (emphasis added). In *Cartensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 116 S. Ct. 182 (1995), the Eighth Circuit held that the plaintiff could not sue for

failure to have a propeller guard that was not required under the FBSA. The court reasoned that "[s]tate damages actions based on such failure would establish a regulation 'imposing a requirement . . .' that is not identical to that prescribed by the Coast Guard." *Id.* at 432.

The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") provides that no state shall impose "any requirement for labeling or packaging in addition to or different from those required" under FIFRA. 7 U.S.C. § 136. In *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993), the Seventh Circuit rejected arguments that the common law and positive law should be treated differently with respect to preemption. The court found it "silly" that Congress "wouldn't also be concerned about the distorting effects of tort actions." *Id.* at 370. The Seventh Circuit concluded that all arguments based on a perceived distinction between common law and positive law had "evaporated" after this Court's decision in *Cipollone*. *Id.*

The National Traffic and Motor Vehicle Safety Act ("NTMVSA") preempts "any safety *standard*" not identical to the federal safety standard for that equipment. 15 U.S.C. § 1392(d). Under the NTMVSA, car manufacturers are given the choice of equipping cars with air bags or two other types of passenger restraints. In *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), the Tenth Circuit preempted the plaintiff's negligent design suit, finding a common law action to hold manufacturers liable for failing to install air bags "tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area." *Id.* at 789 (citing *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), a case following other First Circuit precedent finding state *tort* suits under the FCLA preempted because they had "a *regulatory* effect" (emphasis added)).

Despite "the many decisions" involving federal consumer safety statutes from other courts of appeals, the First Circuit failed to analyze the case below according to the traditional statutory construction tests enunciated by this Court. Instead of giving the preemption provision of the FFA its plain meaning, the First Circuit determined what it thought was "reasonable," *i.e.*, what it would have preempted had it been Congress. No other court of appeals has gone beyond the preemption provision, its legislative history, and its underlying policies to examine the substantive federal standard in order to determine whether that standard "merits" a preemptive effect on other laws.

As a result of its disregard of general preemption principles, the First Circuit's result conflicts with the decisions of many other courts of appeals construing indistinguishable consumer safety statutes. Those courts of appeals recognized that permitting juries to assess damages for a manufacturer's failure to meet a standard of care differing from the uniform federal standard established conflicting requirements. The decision of the First Circuit, on the other hand, frustrates Congress's express intent to ensure the uniformity of apparel flammability standards by permitting jury awards to require higher flammability standards without consideration of their effect on interstate commerce. This conflict in the decisions of the courts of appeals warrants this Court's review.

* * * *

In sum, the decision of the First Circuit below, holding that the express preemption clause of the FFA does not reach *any* common law claims, is in conflict with this Court's precedents on preemption analysis and would unnecessarily subject manufacturers to varying flammability standards in different states. The decision below also directly conflicts with the Eighth Circuit's decision in *Moe* v. *MTD Products, Inc.*, holding that the same statutory terms apply to common law claims in the CPSA.

Finally, the First Circuit decision is inconsistent with the decisions of numerous courts of appeals construing the preemption provisions of a wide variety of federal consumer safety statutes. Even though it is clear Congress prohibited the states from enacting nonidentical flammability standards, the First Circuit has ignored the plain meaning of the statute and permitted state juries to carry out this same function, destroying the uniformity Congress sought in enacting the FFA. This case warrants review by this Court in order to prevent the imposition of this onerous and unjustified burden on manufacturers operating in interstate commerce.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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